UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GeBBS HEALTHCARE SOLUTIONS, INC.
Plaintiff,

Hon. Gregory H. Woods

CIVIL No: 16-cv-02206-GHW

v.

ORION HEALTHCORP, INC.,
Defendant.

REPLY BRIEF

BRIEF IN REPLY TO DEFENDANT'S OPPOSITION TO PLANTIFF'S MOTION TO DISMISS DEFENDANT'S COUNTERCLAIMS FOR FAILURE TO STATE A CAUSE OF ACTION

The Plaintiff respectfully submits this Brief in reply to the Defendant's opposition to Plaintiff's Motion to Dismiss Defendant's first amended counterclaims for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

ARGUMENT

Contrary to the Defendant's assertion, Plaintiff has addressed the appropriate pleading standard for a Motion to Dismiss as set forth in *Ashcroft v. Iqbal, 556 U.S. 662* which states that courts are to first "identify pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." 556 U.S. at 679. Accordingly, the Defendant's counterclaims are not entitled to the assumption of truth as they are no more than mere conclusions. Further, to overcome a dismissal, "a [counterclaim] must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' Iqbal, 129 S. Ct. at 1949 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). It is Plaintiff's position that the Defendant's counterclaims are nothing more than mere conclusions without sufficient factual matter to withstand the legal threshold required by the court. Therefore, the Defendant's counterclaims must be dismissed.

ALLEGED BREACH OF CONTRACT – NON PERFORMANCE
(Count I of the Defendant's Amended Counterclaims)

As stated above, to withstand dismissal, "a [counterclaim] must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' Iqbal, 129 S.Ct. at 1949 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Further, the counterclaims which are mere conclusions are not entitled to the assumption of truth. Defendant's first counterclaim is a mere duplication of certain phrases that appear in Paragraphs 2 and 3 of the Addendum **(Exhibit B)**, but do not provide sufficient factual matter of the alleged non-performance.

Specifically, Defendant repeats phrases from Paragraphs 2 and 3 of the Addendum alleging Plaintiff's failure to (a) devote sufficient personnel and resources to its performance of the Services; (b) process new charges in a timely manner; (c) promptly pursue unpaid balances; and (d) maintain accurate records, however, it fails to provide sufficient factual matter or specifics as to these allegations which are nothing but mere conclusion. Given the legal standard set forth, mere recitation of these phrases does not fall within the pleading standards as they are mere conclusions without sufficient factual matter.

While Plaintiff claims that it abided by the terms of the Addendum between the parties, Defendant provides no evidence of either providing the Plaintiff any written notice of dispute related to the Plaintiff's services or proof of any non-performance issues raised at **any time** prior to the Complaint being filed. The counterclaim does not provide sufficient facts because there was never an issue with Plaintiff's performance. Raising non-performance as an issue after this complaint was filed is a mere afterthought by the Defendant and is made in bad faith. Plaintiff requests that this counterclaim be dismissed.

ALLEGED BRACH OF CONTRACT – IMPROPER TERMINATION
(Count II of the Defendant's Amended Counterclaims)

Plaintiff was well within its right to invoke the termination clause in paragraph 5(c) of Addendum 3, and was not required to give more than a ten (10) days' notice of termination to Defendant. As of December 9, 2015, around sixty-four (64) invoices were either underpaid or entirely unpaid and delinquent. These invoices totaled $777,022.05 in funds owed, with additional amounts not-yet-invoiced for November and December of 2015. Despite repeated requests for Defendant to pay these amounts, there was no response from the Defendant. There was also never an agreement between the parties that Plaintiff would continue with the contract for a reasonable period if a partial payment was made. Defendant fails to provide evidence of such an understanding between the parties nor did it dispute the termination of services at the time the Notice of Default was served. Accordingly, the Notice of Default (Exhibit C) and the Notice of Termination (Exhibit D), followed by the termination of services were proper. Plaintiff requests that this counterclaim be dismissed.

ALLEGED FRAUD
(Count III of the Defendant's Amended Counterclaims)

As argued in Plaintiff's Brief filed with the Motion papers, the elements of fraud must be established by clear and convincing evidence. *See* Rudman v. Cowles Commc'ns, Inc., 280 N.E.2d 867 (1972), *Id.* Further, Defendant has failed to plead the elements of fraud with particularity as required by Rule 9(b) of the Federal Rules of Civil Procedure. *Rombach v. Chang F.3d 164, 166 (2d Cir.2004).*

Specifically:

a. **Defendant fails to plead facts sufficient to indicate that there was a false representation or misrepresentation by Plaintiff**: The Defendant alleges that the parties agreed that if the Plaintiff made a partial payment against the balance due, the Plaintiff would continue to perform the service for a reasonable time while the Defendant sought to find a replacement for the Plaintiff. The Defendant provides no evidence that such an agreement was ever reached between the parties. ***It is Plaintiff's position that, there was neither such a representation made by the Plaintiff to the Defendant, nor was there any such understanding or agreement between the parties***. The Defendant fails to provide any evidence of such representation made by Plaintiff or that there was such an understanding or agreement between the parties.

b. **Defendant fails to plead facts sufficient to indicate that Plaintiff had knowledge of the false representation or misrepresentation when it was made**: While Defendant fails to demonstrate that there was ever an agreement between the parties that Plaintiff would continue services for a reasonable period of time, they do not provide facts supporting the allegation that Plaintiff had any intentions of continuing to perform services or having made representations as to the continuation of services to the Defendant.

c. **Defendant fails to plead facts sufficient to indicate justifiable reliance on the alleged agreement between the parties based on Plaintiff's representation**: Defendant fails to provide any evidence of its reliance on the alleged agreement between the parties that the Plaintiff would continue its services for a reasonable period of time. In fact, by not responding and/or ignoring the Notice of Default (**Exhibit C**) and the Notice of Termination (**Exhibit D**), Defendant has, in fact, proven otherwise.

d. **Defendant fails to plead facts sufficient to indicate any injury caused to Defendant due to its reliance on the alleged misrepresentation of Plaintiff**: If there was any injury to Defendant, it was not because of its reliance on Plaintiff's representation of continuing services for a reasonable period of time, but because it failed to pay the monies owed to Plaintiff and ignored the Notice of Default (**Exhibit C**) and the Notice of Termination (**Exhibit D**), leading to the termination of services by Plaintiff.

It is known that in a claim for fraud/misrepresentation, "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. Revonate Mfg., LLC v. Acer Am. Corp., No. 12 CIV. 6017 KBF, 2013 WL 342922, at *2 (S.D.N.Y. Jan. 18, 2013). Plaintiff reiterates that Defendant has not adequately pled justifiable reliance leading to an injury, on an alleged understanding between the parties based on Plaintiff's representation, required to support a fraud claim. Plaintiff requests that this counterclaim be dismissed.

CONCLUSION

It is Plaintiff's position that the counterclaims alleged by the Defendant are lacking in factual support and are inadequate to support its claims. Even if the court were to take the Defendant's recitation of facts as true, they are still insufficient to support Defendant's claims per the legal threshold under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Wherefore, based upon the foregoing, Plaintiff requests that this Court issues an Order (a) dismissing Defendant's Counterclaims dated October 11, 2016 for failure to state a claim upon which relief can be granted, and (b) granting the Plaintiff such other relief that the Court deems just, proper and equitable.

Date: 12/19/2016.

Prema Roddam

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